

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 290 of 1992

with

CIVIL APPLICATION No 2237 of 1992

with

CIVIL APPLICATION No.1144 of 1993

with

CIVIL APPLICATION No.3143 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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HARSHADBHAI ZINABHAI DESAI

Versus

BHAVNABEN HARSHADBHAI DESAI

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Appearance:

1. Appeal from Order No. 290 of 1992  
MR DD VYAS for Appellant  
MR DR BHATT for Respondent

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CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 23/12/98

ORAL JUDGEMENT

1. Heard the learned counsel for the appellant.

2. This is an appeal under order 43 rule 1 CPC wherein two specific independent orders are challenged by the respondent (original opponent).

3 The respondent-original applicant being the wife had taken out proceedings before the trial court u/s.27 of the Hindu Minority and Guardianship Act. In the said proceeding, the wife had given an interim application Exh.3 for interim custody of the minor child. In the said proceeding, the original opponent-husband had given an application Exh.14 wherein, the specific prayer was that the trial Court should frame and decide the issue of territorial jurisdiction of the Court as a preliminary issue.

The trial Court specifically granted the appllellant-opponent's application Exh.14, raised the question of territorial jurisdiction as a preliminary issue and decided the same. Thus, the appellant's application Exh.14 was completely allowed. Obvisiously, no grievance could be raised against the grant of such an application. It may be, however, that the finding recorded as a result of determination of such issue may give rise to a grievance on the part of the present appellant. However, the finding on the issue to the effect that the trial court had territorial jurisdiction to decide the dispute, is not a finding which can be challenged in an appeal under order 43 rule 1 CPC. I, therefore, do not propose to deal with the validity of that finding in the present appeal. In this context, the learned counsel of the appellant states that he proposes to file a revision u/s.115 CPC challenging this finding. I am not required to comment upon the action which may be taken by the appellant in this regard.

4. The appellant has also challenged as part of this appeal, the order passed by the trial court below Exh.3 whereby custody of the minor child has been granted to the wife-original applicant. So far as the merits of this order is concerned, I am satisfied that the same is unexceptional, on the facts and circumstances of the case. Custody of a minor child aged only 13 months has rightly been awarded to the applicant-wife( the mother of the child).However, the learned counsel for the appellant states that this finding recorded by the trial court must

necessarily be subject to the correct determination of the issue as to jurisdiction, which would only be decided in the revision now proposed to be filed. In this context, I may only observe that the impugned order as to interim custody is unexceptional at the present stage and does not require interference on the facts. However, if the revisional court ultimately decides the relevant issue in favour of the present appellant, it may be open to the revisional court as a consequence of such a finding to declare that the order below Exh.3 also suffers from absence of jurisdiction. In other words, therefore, the finding recorded in the present appeal qua the order below Exh.3 may be subject to the result of the revision.

At this stage, my attention has been drawn to the fact that on account of the lapse of time and intervening orders, the impugned order below Exh.3 has not been implemented and consequently, the minor daughter has remained with the appellant-father till to-day. She would be aged almost 10 years. In view of these circumstances, the trial Court is also required to apply its mind not merely to the welfare of the child, but also to the child's desires and affections, which ultimately determine the emotional health of the child. It is therefore, appropriate that in case, an application is made to the trial Court by the appellant-husband, the trial court shall decide such application in the light of the circumstances then prevailing.

C.A.Nos.2237/92, 1144/93 and 3143/94( since the main appeal has been disposed of to-day) are also accordingly disposed of.

At this stage, after the judgement was dictated in open court but before it was signed, learned counsel for the appellant seeks a stay and/or abeyance of the present order for four weeks with a view to approach the Supreme Court. The operation of this order shall, therefore, be stayed upto 31st January 1999 with the specific understanding that no further extension shall be sought nor granted.

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